Supreme Court, U. S.
FILED
MAY 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-~~77-1651~~

THE YOUNGSTOWN CARTAGE CO., *Petitoner,*

v.

THE UNITED STATES OF AMERICA

and

THE INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

GEORGE, GREEK, KING, MCMAHON
& MCCONNAUGHEY
100 East Broad Street
Columbus, Ohio 43215
(614-228-1541)

By: JOHN P. MCMAHON

Counsel for Petitioner,
THE YOUNGSTOWN CARTAGE CO.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes and Regulations Involved	4
Statement of the Case	4
Reasons for Granting the Writ	11
Conclusion	25
Appendix A:	
Opinion of the Court Below	1a
Appendix B-1:	
Order served August 8, 1975, denying the Sub 28-G application	7a
Appendix B-2:	
Order served January 7, 1976, denying petition for reconsideration in the Sub 28-G application	9a
Appendix B-3:	
Order served February 24, 1976, denying petitioner's petition for postponement of the effective date and for reconsideration, reopening and oral hearing	11a
Appendix C-1:	
Order served November 19, 1976, denying the Sub 31 application	13a

Page

APPENDIX C-2:

Order served March 21, 1977, denying petition for reconsideration of the Sub 31 application 16a

APPENDIX D:

Administrative Procedure Act:

Section 8 (5 U.S.C. § 557(c)) 18a

Section 10(e) (5 U.S.C. § 706) 18a

National Transportation Policy

Preceding § 1 of Interstate Commerce Act, (5 U.S.C. preceding § 1) 19a

Interstate Commerce Act:

Section 206(a) (49 U.S.C. § 306(a)) 20a

Section 207(a) (49 U.S.C. § 307(a)) 20a

Gateway Elimination Rules

49 CFR § 1065.1 ..... 21a

APPENDIX E:

Letter dated September 30, 1974 from Interstate Commerce Commission requesting supplemental information respecting YCC's MC-8958 (Sub 28-G) application 26a

APPENDIX F:

Summary and annualization of weight of shipments abstracted from Document No. 20, Appendices G through P in Case No. 77-1337 ..... 28a

Page

CITATIONS:

Administrative Procedure Act, Secs. 8 and 10(3) (5 U.S.C. Secs. 557(c) and 706) 4

Alton Railroad Co. v. United States and Interstate Commerce Commission, 315 U.S. 15 (1942) 16-17

Automatic Canteen Co. v. F.T.C., 346 U.S. 61, 81, 97 L. Ed. 1454, 73 S. Ct. 1017 (1953) 20

Bowman Transportation v. Arkansas-Best Freight System, 419 U.S. 281 (1974) 21

Burlington Truck Lines v. United States, 371 U.S. 156, 9 L. Ed. 2d 207, 8 S. Ct. 239 (1962) 14, 19

Chem-Haulers, Inc. v. Interstate Commerce Commission and United States, 565 F. 2d 728 (1977) ..2-3, 12

Childress—Elimination Sanford Gateway, 61 M.C.C. 421 (1952) 6, 17, 22

Dixie Ohio Express, 30 M.C.C. 291 (1941) 23

Frozen Food Express v. Interstate Commerce Commission and United States, 535 F. 2d 877 (1976) 3, 11, 12, 14, 17

Gateway Elimination Rules, 49 C.F.R. 1065 ....4, 5, 7, 13, 22, 24

Goldberg v. Kelly, 397 U.S. 254 (1970) 18

Interstate Commerce Act, Secs. 206(a) and 207(a) 49 U.S.C., Secs. 306(a) and 307(a) 4

Isbrandtsen Co., Inc. v. United States, 96 F. Supp. 883 (S.D.N.Y. 1951) 19

National Transportation Policy preceding Section 1 of the Interstate Commerce Act (49 U.S.C. Sec. 1) 4

Secretary of Agriculture v. United States, 347 U.S. 645 20

United States and Interstate Commerce Commission v. Carolina Freight Carriers Corp., 314 U.S. 472 (1942) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-

THE YOUNGSTOWN CARTAGE CO., *Petitoner,*

v.

THE UNITED STATES OF AMERICA

and

THE INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Youngstown Cartage Co. (YCC), petitioner below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit rendered February 23, 1978, in Case Nos. 76-1225 and 77-1337. That judgment upholds the Interstate Commerce Commission's (Commission) denial of petitioner's MC-8958 Sub 28-G (Sub 28-G) and MC-8958 Sub 31 (Sub 31) Gateway Elimination Applications.

OPINIONS BELOW

The opinion of the Court of Appeals entered February 23, 1978, (attached as Appendix A hereof) is reported at —— U.S. App. D.C. ——, —— F. 2d ——.

Attached to this petition as Appendix B-1 through B-3 are copies of the orders of the Interstate Commerce Commission served in The Youngstown Cartage Co., Extension—Gateway Elimination, MC-8958 Sub 28-G, which are the orders of the Commission involved in the Court of Appeals Case No. 76-1225.

Attached to this petition as Appendix C-1 and C-2 are copies of the orders of the Commission served in The Youngstown Cartage Co., Extension—Elimination of Gateways, No. MC-8958 Sub 31 which are the orders of the Commission involved in the Court of Appeals Case No. 77-1337.

JURISDICTION

The decision of the Court of Appeals was made and the judgment was entered on February 23, 1978.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) and § 2350.

QUESTIONS PRESENTED

1. Whether the Appendix A opinion of the Court of Appeals upholding the Commission's denial of petitioner's Sub 28-G and Sub 31 Gateway Elimination Applications are in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Frozen Food Express* v. *United States and Interstate Commerce Commission,* 535 F.2d 877 (1976) and with the Court of Appeals for the District of Columbia's own decision in *Chem-Haulers, Inc.* v. *Interstate*

Commerce Commission and United States, —— U.S. App. D.C. ——, 565 F. 2d 728 (1977), both of which decisions vacated orders of the Interstate Commerce Commission denying gateway elimination applications where the Commission did not hear the applications on their merits or explain why it granted the gateway elimination applications of some carriers and denied the applications of others similarly situated.

2. An important question of Federal law not previously decided by this Court is whether the Commission may use its Gateway Elimination Rules (49 C.F.R. 1065) as a device to reduce competition among regulated carriers by forcing petitioner, YCC, to stop competing for over 60,000,000 pounds of freight per year that petitioner had been hauling in competition with other regulated carriers.

3. Whether the Commission's orders denying petitioner's Sub 28-G Gateway Elimination Application are discriminatory, arbitrary, capricious and in violation of applicable law and the Commission's own regulations in that, without any consideration of the merits of petitioner's applications, those orders eliminate petitioner from motor common carrier competition in the interstate transportation of property which petitioner had been transporting via its authorized gateways in competition with other carriers for many many years.

4. Whether the Commission discriminated against petitioner, abused its discretion, and denied petitioner due process of law in refusing to consider petitioner's Sub 28-G and Sub 31 Gateway Elimination Applications, on their merits.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the following statutes and regulations are involved and are reproduced in Appendix D: Secs. 8 and 10(e) of the Administrative Procedure Act (5 U.S.C. Secs. 557(c) and 706); National Transportation Policy preceeding Section 1 of the Interstate Commerce Act (49 U.S.C. Sec. 1); Secs. 206 (a) and 207(a) of the Interstate Commerce Act (49 U.S.C. Secs. 306(a) and 307(a); and Gateway Elimination Rules, 49 C.F.R. 1065.

STATEMENT OF THE CASE

Prior to June 4, 1974, a motor common carrier holding two separate and unrestricted grants of irregular route authority having a common point of service *to* which a given shipment might be transported under one authority and *from* which the same shipment might be transported under the other could furnish a through service on the shipment by combining the two separate authorities at the overlap or common point of service. Such common service points are known as "gateways" and the practice of combining authorities to provide a through service not expressly authorized by either authority alone is known as "tacking".

On November 23, 1973, the Commission served a Notice of Proposed Rulemaking in Ex Parte 55 Sub 8 (119 M.C.C. 170), initiating a rulemaking proceeding designed to outlaw future tacking of separate grants of irreular route authority (with certain exceptions [1]) and to compel carriers to eliminate their gateways and

[1] Except "on movements of 300 miles or less, or where its certificated authorities specifically authorize such tacking or joinder." 49 C.F.R. 1065(b).

avoid unnecessary miles of travel to reach gateways in light of the oil crisis and the critical need to conserve motor vehicle fuel. Subsequently the Commission found that Gateway Elimination Rules (49 C.F.R. Sec. 1065) should be adopted because "such rules are reasonable and necessary to the effective enforcement of the provisions of part II of the Interstate Commerce Act, as amended, and . . . . are required by the present and future public convenience and necessity." *Gateway Elimination Decision,* 119 M.C.C. 530, 558, served February 25, 1974.

The Commission's Gateway Elimination Rules provided for two different procedures depending upon whether the distance between the origin and destination points via the most direct routes was either more or less than 80% of the distance between the same points via the irregular route carrier's gateways. Where the circuity involved in observing a carrier's gateways was 20% or less, a carrier could eliminate its gateways without a showing of past service or competition with other carriers by filing "E Letter-notices" which would be published in the Federal Register and thereupon the gateways were eliminated. Where the circuity involved in observing a carrier's gateways was more than 20%, a carrier could eliminate its gateways only by filing a special type of application under Section 207 known as a "G" application—hence petitioner YCC's Sub 28-G. A "G" application had to include not only the normal information contained in a Section 207 application form (OP-OR-9) but also proof that the carrier (1) had been handling traffic via its gateways during the two years preceding November 23, 1973, or (2) "that a public need for such through service exists." 49 C.F.R. 1065(d)(2)(B). In other

words, alternative methods of proof, either (1) past service performed or (2) verified statements of supporting shippers. All of this had to be done between February 25 and June 4 of 1974.

In its gateway elimination decision served February 25, 1974, the Commission articulated for the first and only time its conception of the scope and purpose of the evidentiary requirements of a "G" application. Such applications were intended to enable carriers to eliminate gateways where the carrier could demonstrate that it had been handling such traffic via its gateways in an economic and efficient manner. The Commission assured carriers that "[they] generally will be required to forego only those operations and services that they have not in the past held out to the public on a reasonably competitive basis." *Gateway Elimination,* 119 M.C.C. at 538.

No specific format was prescribed by the Gateway Elimination Rules for the presentation of the carrier's evidence of its past operations and competition via its gateways during the two year test period from November 23, 1971 to November 23, 1973—roughly the calendar years of 1972 and 1973. The Commission's only guidance was the following statement:

> "In deciding such an application we will apply the criteria enunciated in the *Childress* case, *supra* [*Childress-Elimination of Sanford Gateway,* 61 M.C. 421 (1952] [2] as amplified in other Commission

[2] In an application • • • involving the elimination of a gateway • • • the essential facts to be determined, in the absence of testimony by public witnesses, are (1) whether applicant is actually transporting a substantial volume of traffic from and to the points involved by operating in good faith through the gateway and, in so operating, is effectively and efficiently competing with the existing

> precedent decisions. This will not, as many parties fear, impose a greater burden of proof than that governing regular elimination-of-gateway applications, but will be somewhat more akin to the standard "grandfather" procedures utilized by this Commission in the past." *Gateway Elimination,* 119 M.C.C. at 550.

The net result of these considerations was a requirement in the gateway elimination rules that the application include "all of the evidence applicant plans to present in the proceding including (to the extent pertinent) evidence of past operations by the applicant . . . via the gateway . . ." 49 C.F.R. Secs. 1065(d)(2)(iii). Carriers were given 60 days from the effective date of the regulations in which to assemble all their evidence and submit their applications.

Petitioner, YCC, filed its "E" Letter-notices (under 20% circuity) plus its Sub 28-G application on June 4, 1974. The Sub 28-G territorially overlapped its "E" Letter-notice but such overlaps were contemplated by the Commission's follow-up order, to its Gateway Elimination Rules (Ex Parte MC 55 Sub 8). This follow-up

carriers, and (2) whether the elimination of the gateway requirement would enable applicant to institute a new service or a service so different from that presently provided as to materially improve applicant's competitive position to the detriment of existing carriers. In the former instance, a grant of the authority sought is justified solely upon proof that the proposed operation would result in operating economies, which although primarily a benefit to the applicant, indirectly benefit the public through the medium of more efficient and economical service. In the latter instance, however, where the elimination of the gateway requirement would allow a new service, or would provide applicant with a substantial competitive advantage not previously enjoyed, it is incumbent upon applicant to prove public convenience and necessity the same as in any other applicant for new authority (61 M.C.C. 421, 428).

order was served April 5, 1974, approximately one month prior to the filing of YCC's Sub 28-G application and it reads in pertinent part:

> "... that it is recognized that some territorial combinations cannot be readily described under the 20-percent rule, for the boundaries tend to shift as traffic origins and distances change; that in such circumstances, the carriers should be reminded that the 20-percent rule provides for expeditious avoidance of a gateway and that the carrier can readily obtain a significant mileage savings in certain of its operations; and that the OP-OR-9 ["G"] Gateway Elimination applications will provide a means to round out the carrier's operations at a later date;"

Petitioner's Letter-notices were filed June 4, 1974 and later published in non-sequential order in various issues of the Federal Register. They were published a few at a time from September 6, 1974 to September 5, 1975, and some were not published at all. Petitioner's Sub 28-G application, also filed June 4, 1974, contained petitioner's "competitive" evidence in the form of a traffic exhibit showing 800 shipments handled by YCC through its gateways during the two-year gateway elimination test period. Those 800 shipments were representative only, amounting to approximately 1/200 (.5%) of all shipments handled by petitioner through the subject gateways in competition with other carriers during the two-year test period.

By order served August 8, 1975 (App. B-1), the Commission denied YCC's Sub 28-G application on the grounds that its "massive" traffic exhibit was not presented "in such a way as to enable the Commission to determine that it has been a substantial competitor

through each of the involved gateways" inasmuch as it failed to indicate (1) through which gateways each shipment moved and (2) which shipments involved more than 20% circuity. Prior to the Commission's August 8, 1975 decision, petitioner's only notice that the Commission was in need of additional information to process petitioner's Sub 28-G application was a form letter from the Commission (App. E) dated September 30, 1974 requesting that applicant correlate each of the portions of its authority involved in the application with the actual gateway point(s) sought to be eliminated with reference thereto. Petitioner's counsel readily complied with this request.

Petitioner had no further requests from the Commission for explanatory information and heard nothing more from the Commission for almost a year, namely August 8, 1975, when the Commission served its App. B-1 decision refusing to consider petitioner's Sub 28-G application on its merits because its "massive traffic exhibit showing 800 shipments" was considered to be "unworkable" and therefore the Commission concluded Petitioner's Sub 28-G application "must be denied" (App. B-1).

Petitioner's Sub 28-G application was thus denied without ever having been considered on the merits. The Commission made no findings as to the adequacy of the evidence presented nor did it make any findings as to whether petitioner was or was not an existing and efficient competitor for the through services which petitioner sought to continue to provide.

By order served January 7, 1976, (attached as Appendix B-2), YCC's Petition for Reconsideration of its Sub 28-G application was denied by the Commission.

This Appendix B-2 order was effective January 22, 1976, on which date YCC was ordered to cease competition via tacking.

On January 21, 1976, petitioner filed a Petition for Modification of the Commission's Appendix B-2 order so that petitioner could continue to tack and serve the public. In that same pleading, petitioner also requested reopening and oral hearing on its Sub 28-G application. That relief was also denied by Commission order served February 24, 1976 (App. B-3). Subsequently, a Petition For Review of the denial of YCC's Sub 28-G application was filed in the United States Court of Appeals for the District of Columbia Circuit and docketed as Case No. 76-1225.

Also on January 21, 1976, one day before the effective date of the Commission's Sub 28-G "stop tacking" order, petitioner filed a Second Gateway Elimination Application, docketed as MC-8958 Sub 31. The Second Gateway Elimination application was filed concurrently with the Petition for Modification of Effective Date, For Reopening of Case and for Oral Hearing respecting the Commission's denial of the first or Sub 28-G application. The Sub 31 application was filed to protect and preserve a fresh record of petitioner's operations serving the public via authorized gateways not only during the original two test years (1972-1973) but also during the two subsequent years of pendency of the Sub 28-G application (1974-1975).

The second or Sub 31 application was denied by order of the Commission served on November 19, 1976 (App. C-1). It was denied on the grounds that the application was filed after June 4, 1974, and thus could not be considered as an attempt to eliminate gateways

so gateway elimination criteria were inapplicable. That same Appendix C-1 order also ruled that petitioner's Sub 31 application is not analogous to any other motor carrier application cases where a relaxed burden of proof is warranted [3] but did not explain why it is not analogous. Once again, the Commission denied YCC's second or Sub 31 application without considering the evidence submitted and the merits of the application.

On December 16, 1976, petitioner sought reconsideration of the Commission's Sub 31 denial which request was denied by order of the Commission served March 21, 1977 (App. C-2).

A second Petition For Review appealing the Commission's denial of YCC's Sub 31 Gateway Elimination Application was filed by petitioner with the United States Court of Appeals for the District of Columbia Circuit on April 5, 1977. It became Case No. 77-1337, which was consolidated with Case No. 76-1225 for oral argument and disposition.

Appendix A is the lower court's disposition of both the Sub 28-G and the Sub 31 applications.

REASONS FOR GRANTING THE WRIT

1. In upholding the Commission's denial of YCC's Sub 28-G application the court below acted in a manner contrary to and in conflict with the decision of the Court of Appeals for the Fifth Circuit in a virtually identical case, *Frozen Food Express, Inc.* v. *United States and Interstate Commerce Commission,* 535 F. 2d 877

---

[3] E.g. Route conversions, interchange point relocations, alternate routes, "grandfather" applications, or conversions of certificates of registration.

(1976). In the *Frozen Food Express* case, the Commission found applicant's traffic evidence (one month out of two years) "to fragmentary" whereas in YCC's Sub 28-G the Commission found YCC's traffic evidence "to massive." The Commission's refusal to consider Frozen Food Express's "G" application on its merits was set aside and remanded by the Fifth Circuit Court of Appeals because the Commission's action was not "evenhanded" and thus discriminatory and inconsistent with the treatment accorded other "G" applicants. The Commission's denial of YCC's Sub 28-G application is likewise not "evenhanded" and is likewise discriminatory and inconsistent with treatment accorded other "G" applicants.

The action of the court below is even inconsistent with its own action of December 16, 1977 in *Chem-Haulers, Inc.* v. *ICC and United States*, 565 F. 2d 728. In *Chem-Haulers*, the D.C. Circuit reversed and remanded a decision of the Commission which granted in part and denied in part Chem-Hauler's "G" application without explaining its inconsistent treatment.

Given the clear evidence of record detailing the course of the two agency proceedings involved in this case, the decision of the court below sustaining the Commission's orders on the grounds and for the reasons set forth in its opinion is manifestly at odds with settled principles of appellate review and the obligations imposed upon the court below by the provisions of Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706. Its decision constitutes a departure from statutory court procedures which require reviewing courts to "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."

Furthermore, this case presents a novel and important question of Federal law which has not been but should be decided by this Court. That question is whether the Commission, after having properly adopted Gateway Elimination Rules (49 C.F.R. 1065) may then improperly, arbitrarily and discriminatorily use those rules to stamp out competition within the regulated motor carrier industry. The decision below, affirming the Commission's decisions, must adversely affect the future course of Federal regulation of the motor carrier industry and the vitality of the National Transportation Policy.

Congress has mandated that the Interstate Commerce Commission administer and enforce the provisions of the Interstate Commerce Act with a view to carrying out the National Transportation Policy, which provides in pertinent part the "policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act . . ." (49 U.S.C. preceeding Section 1). It is the Commission's failure to provide such fair and impartial regulation within the context of the gateway elimination proceedings which lies at the heart of this case. Petitioner is now before this Court seeking relief because, unlike so many other motor carriers similarly situated, YCC has been unable to move the Commission to consider either of its two successive Gateway Elimination Applications on their merits. Not only has the Commission been obdurate in its refusal to acquaint itself with the merits of Petitioner's applications but also the court below (App. A, Page 6) has erroneously deferred to the Commission's "considerable leeway" in selecting the rules it will apply "in control of its calendar." Neither the administrative process nor due

process allows for any such "unbounded discretion" under Section 207(a). *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 167, 9 L. Ed. 2d 207, 83 S. Ct. 239 (1962).

In the case of *Frozen Food Express, Inc.* v. *United States and Interstate Commerce Commission,* 535 F. 2d 877 (1976), the application of Frozen Food Express, Inc. (FFE) for elimination of gateways was denied by Commission Review Board No. 3 on the grounds that the evidence submitted in support of the application was "to fragmentary to allow an adequate assessment of applicant's proposal," and does not "provide a satisfactory basis upon which to evaluate protestants' interests." A petition for reconsideration was denied and FFE sought review of the Commission's orders by the Court of Appeals for the Fifth Circuit.

The Fifth Circuit found (535 F. 2d at 880) that the Commission had acted in an "unjust inequitable and discriminatory" manner not only with respect to FFE's application but also with respect to many other gateway elimination applications:

> "It is apparent from reading the *Squaw Transit* case [*Squaw Transit Co.* v. *United States,* 402 F. Supp. 1278 (N.D. Okla. 1975)] and the careful review by the court of numerous cases which the Commission considered under the gateway elimination filings that the Commission's actions were not evenhanded as between carriers. Some carriers were allowed to file their applications late, some to file their supporting evidence late, and some were denied either the right to file late or to have late-filed evidence considered. ***Frozen Food Express, Inc., supra,*** at 879.

The Fifth Circuit concluded (535 F. 2d 879) that FFE "should have been accorded the same treatment" and ordered the Commission to reopen FFE's "G" application and allow FFE an opportunity to supply the particularized data, the absence of which had been deemed fatal to its application by the Commission:

> "FFE has never had its application considered on the merits. An evenhanded, as opposed to an inconsistent, policy by the Commission as to all carriers, including FFE, in disposing of these gateway applications requires that the carrier be afforded reconsideration. No one can be injured by reconsideration except FFE and the public." ***Frozen Food Express, Inc., supra*** at 880.

In YCC's Sub 28-G application, the court below held that the Commission was "not unreasonable in requiring that the applicant meet the minimal procedural burden put on the carriers in order to help the agency with the formidable administrative burden of the gateway elimination program . . ." (App. A, Page 4). Petitioner contends it more than met "the minimum procedural burden" but even if it did not, such a holding completely misapprehends the gravamen of YCC's complaint, *viz.,* that Petitioner was never afforded an evenhanded non-discriminatory opportunity to "meet the minimum procedural burden" and have its application considered on the merits in the manner that other carriers were afforded, either by the Commission acting on its own, or at the instance of a reviewing court. YCC gave the Commission all the supplemental information it ever asked for (App. E).

After its Sub 28-G application was denied, YCC requested the Commission to reopen the proceeding and hold an oral hearing to obtain whatever additional in-

formation the Commission may have needed to consider its Sub 28-G application on the merits but the Commission also denied that request (App. B-3). At the same time YCC filed its Sub 31 application and supplied all the necessary proof in the exact fashion that YCC believed the Commission wanted it supplied, with all duplications eliminated. YCC's second application was also denied (App. C-1 and C-2) without any consideration of its merits under what the court below erroneously described as the Commission's "considerable leeway in control of its calendar" (App. A, Page 6).

For the Commission to give motor carriers every indication that the subject gateway elimination applications would be considered pursuant to a liberal construction of the regulations and then respond to a perceived deficiency in the petitioner's application in such a draconian fashion is the epitome of arbitrary and capricious action. That such action has not been taken against all carrier applicants similarly situated is gross discrimination amounting to an abuse of discretion. In its gateway elimination decision, the Commission surpressed motor carriers fears regarding "burden of proof" in "G" applications by stating that it would follow procedures "somewhat more akin to the standard 'grandfather' procedure utilized by this Commission in the past." *Gateway Elimination,* 119 M.C.C. 550. This Court long ago established that under the "grandfather" concept, applicants would be entitled to a liberal construction of the regulations with the goal of achieving "substantial parity between future operations and prior bona fide operations." ***United States and Interstate Commerce Commission*** v. ***Carolina Freight Carriers Corp.,*** 315 U.S. 475, 481, 86 L. Ed. 971, 62 S. Ct. 772 (1942); ***Alton Railroad Co.*** v. ***United***

States and Interstate Commerce Commission, 315 U.S. 15, 22, 86 L. Ed. 586, 62 S. Ct. 432 (1942). Petitioner relied on those well-established standards to its detriment and now asks nothing more than an opportunity to meet whatever *ad hoc* burdens of proof, if any, the Commission may be allowed to impose.

The Commission's denials of the Petitioner's applications carry a prohibition against future tacking and future competition for the traffic YCC had always transported via its gateways prior to January 22, 1976. Consequently, they deprive Petitioner of a substantial property right and the public of an existing and efficient transportation service without any effort or attempt being made by the Commission to discern the substantial grounds upon which YCC's applications were based. This would not have been so when the *Childress* case was decided in 1942 (61 M.C.C. 421) because at that time if a carrier's proof of past competition with existing carriers failed to eliminate its gateways, the carrier could still continue to tack and compete via its gateways. All this has changed now, as the Fifth Circuit noted in *Frozen Food Express:*

> "Further, the petition alleged that denial of the application carried with its also a requirement to cease further 'tacking' operations which had been conducted for a 20-year period, all to the substantial detriment of the carrier's revenues and of the motor common carrier service which FFE has been rendering to the shipping and receiving public. Accordingly, not only did the carrier lose the right to eliminate circuities in its gateway operations, it also lost the right to continue common carrier services which it alleges had been rendered by it for a long period of time by 'tacking' of its operating authority." (535 F. 2d 878, 879).

Thus the Commission's and the lower court's disposition of YCC's Sub 28-G and Sub 31 Gateway Elimination Applications evidence not only a total disregard for the procedural safeguards which are meant to shield against arbitrary and capricious action and protect the substantive rights of the petitioner which were at stake, but also a complete abdication of the Commission's responsibility to the public to ensure that it was not proscribing a valuable and necessary transportation service.

It is precisely because the circumstances surrounding the gateway elimination procedures were so critical that extraordinary efforts should have been made to assure fundamental fairness and to rectify injustices. Instead what we find in this case is the reviewing court actually excusing the Commission's laxity on the basis of the enormity of the task with which it was confronted. Judicial review should never excuse arbitrariness and caprice. Notice and an opportunity to be heard are the *sine qua non* of due process. The mere fact that the Commission may consider itself to be inconvenienced by the quantity of evidence, or the form in which the evidence is presented, does not outweigh the rights of the parties and the public to a well-considered and fair decision by the Commission. *Goldberg* v. *Kelly,* 397 U.S. 254, 265-266, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970).

The public's right to an existing and efficient transportation service is here at stake as much as the Petitioner's right to perform that service. The Commission has a responsibility to the public which it failed to discharge in the instant case. I.C.C. Commissioner Atchison underscored the importance of the Commis-

sion's responsibility to the public in testimony before a Senate sub-committee quoted with approval by the three-judge court in *Isbrandtsen Co., Inc.* v. *United States,* 96 F. Supp. 883 (S.D.N.Y. 1951):

> "The agency does not do its duty when it merely decides upon a poor or non-representative record. As the sole representative of the public, which is a third party to these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in * * *. [It] is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible * * *." (96 F. Supp. at 888-892).

Notwithstanding this duty, the Commission refused to inform itself. The Commission also refused to allow Petitioner the opportunity to provide it with whatever additional information it considered necessary in whatever form it demanded so that the Commission could understand the extent of Petitioner's past service and competition and thus decide YCC's Sub 28-G and Sub 31 applications on their merits. The denial orders issued by the Commission are totally devoid of any analysis of the merits and thus totally devoid of any basis which would support the denials of YCC's Sub 28-G and Sub 31 Gateway Elimination Applications.

As this Court has previously indicated, in order for a reviewing court to defer to the Commission's discretion, the Commission must present findings and analysis to justify the choice made and provide an indication of the basis on which the Commission exercised its discretion. *Burlington Truck Lines* v. *United States,* supra, page 167.

The court below could not properly defer to the Commission's discretion on the basis of a record which indicates that *expert* discretion has never been exercised on the merits of either YCC's Sub 28-G or its Sub 31 applications. An examination of the succession of orders issuing from the Commission in these cases indicates that the Commission has lapsed into "uncritical generalities or such looseness of expression as to make it essentially impossible" for a reviewing court to determine "what really lay behind the conclusions" under review. *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61, 81, 97 L. Ed. 1454, 73 S. Ct. 1017 (1953)

This Court has stated that "something more precise is requisite in the quasi-jurisdictional findings of an administrative agency" and that this Court must "know what a decision means before it becomes our duty to say whether it is right or wrong." *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654; 98 L. Ed. 1015, 74 S. Ct. 826 (1954); *Automatic Canteen Co.* v. *F.T.C.*, supra, page 81. The instant Commission denial orders are supported by nothing more than an abdication of administrative responsibility in Sub 28-G because YCC's evidence was so "massive" it was considered "unworkable" (App. B-1) and in the Sub 31 by an unexplained and unjustifiable distinction—"this proceeding is not analogous to any motor carrier application cases where a relaxed burden of proof is warranted" (App. C-1). More and far better explanations and justifications than those are required in the proper discharge of the Commission's responsibilities under the regulatory scheme Congress has delegated to it. That scheme is predicated on the principle that an existing and efficient motor carrier is entitled to all the

traffic which it can handle consistent with the public convenience and necessity. The Gateway Elimination decision reassured existing carriers that "[they] generally will be required to forego only those gateway operations and services that they have not in the past held out to the general public on a reasonably competitive basis." *Gateway Elimination,* 119 M.C.C. 530, 538 (1974). Nevertheless, Petitioner YCC has been required to forego continued future competition notwithstanding its substantial past competition for traffic via its authorized gateways for many years—61,437,812 pounds per year over the four years 1972 through 1975 (Case No. 77-1337, Document 29, Pages 5 and 6, attached as App. F). By any standard of competitive impact, that annual volume represents substantial competition and past service to the public which the Commission has now cut off. As this Court noted in *Bowman Transportation* v. *Arkansas-Best Freight System,* 419 U.S. 281, 298; 42 L. Ed. 2d 447, 95 S. Ct. 438 (1974):

> "Our decisions have dispelled any notion that the Commission's primary obligation is the protection of firms holding existing certificates.
>
> * * *
>
> Even where Congress has chosen government regulation as the primary device for protecting the public interest, a policy of facilitating competitive market structure and performance is entitled to consideration. *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944) . . ."

In its order denying Petitioner's Second or Sub 31 Gateway Elimination application, the Commission stated that neither the rules established in *Gateway Elimination,* supra, nor the older principles established

in *Childress—Elimination Sanford Gateway,* 61 M.C.C. 421 (1952), are applicable to YCC's Sub 31 application because applicant was prohibited from tacking as of the administrative finality (January 22, 1976) of the denial of the First or Sub 28-G application (App. C-1). Thus the Commission erroneously concluded YCC's Sub 31 application could not be characterized as an attempt to eliminate gateways and must be treated as an application seeking new operating authority. Regardless of their filing date or the purpose for which they are filed, all Section 207 applications (Form OP-OR-9) seek new authority. There is no factual or legal basis for such artificial, meaningless and unsupported distinctions.

YCC's Sub 31 application was filed January 21, 1976, a date on and prior to which YCC was authorized to tack and did tack through its gateways for many years including the demonstrated years 1972 through 1975. In support of its Sub 31 Gateway Elimination Application, YCC offered undisputed proof of 61,437,812 pounds of freight per year lawfully handled through its gateways during the years 1972 through 1975. That is proper gateway elimination proof either under the *Childress* case, supra (61 M.C.C. 421, 428) or under the special *Gateway Elimination Rules* (49 C.F.R. 1065) or otherwise. With that kind of proof, YCC did not need any "shipper support" as the Commission and the court below erroneously concluded in denying YCC's Sub 31 application (App. C-1 and C-2, and App. A, Page 5).

The Appendix C-1 order denying YCC's Sub 31 application arbitrarily distinguishes that application from other route-shortening, energy-conservation applications without supplying any factual or legal explanation or justification for such a distinction. The Appendix C-1 order of the Commission mistakenly concludes that YCC's Sub 31 application is "not analagous" to other Section 207 applications such as "route conversions, interchange point relocations, alternate routes, grandfather applications, or conversions of certificates of registration" where a "relaxed burden of proof is warranted" and "motor carrier applicants are entitled to equitable considerations on the basis of their having previously handled traffic which is the subject of a pending application." Why is it "not analagous"? YCC's Sub 31 proof showed that Petitioner YCC had lawfully handled over 61,000,000 pounds of freight per year via its authorized gateways during the years 1972 through 1975. The Appendix C-1 order offers no explanation or justification for casting this undisputed proof aside and refusing to consider YCC's Sub 31 application on its merits—no explanation or justification for rejecting this proof of substantial past competitive service as an adequate substitute for "verified statements of a supporting shipper or shippers in order to establish a prima facie case of need."

No explanation or justification was offered for this arbitrary distinction because there is none! One example will suffice, namely the Commission's approval of the alternate route application of *Dixie Ohio Express,* 30 M.C.C. 291 (1941) where,

> "No shippers or other public witnesses appeared in support of the application. Instead, applicant relies entirely upon proof of certain advantages which will accrue to it and, it is urged, indirectly to the public from its use of the proposed route." (30 M.C.C. 292)

* * *

> "In our opinion, public convenience and necessity, in a proper case, may be found in operating economies and those things which contribute to expedition, safety, and efficiency in operation, all of which, through they benefit first the carrier, indirectly contribute to public safety and more reliable, more expeditious, and cheaper transportation. Given a proper showing of these things, a finding of public convenience and necessity is justified." (30 M.C.C. 295).

Petitioner YCC is merely asking this Court to compel the Commission to justify why YCC's Sub 31 Gateway Elimination Application (filed under the same statute, 49 U.S.C. § 307, as Dixie Ohio Express's) was not entitled to the same "relaxed burden of proof"—the same "equitable considerations."

Important questions of Federal law are involved here. To our knowledge, this Court has not previously considered the question of whether the Commission's application of its Gateway Elimination Rules, 49 C.F.R. 1065, can be used to cut off proven past competition among regulated carriers as the Commission did here. The Commission did it by refusing to consider YCC's Sub 28 and Sub 31 Gateway Elimination Applications on their merits, thereby preventing YCC from competing for interstate traffic which it has been handling for many years.

CONCLUSION

For the reasons above stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE, GREEK, KING, MCMAHON
& MCCONNAUGHEY
By: JOHN P. MCMAHON
Attorneys at Law
100 East Broad Street
Columbus, Ohio 43215
(614-228-1541)

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1225

THE YOUNGSTOWN CARTAGE COMPANY, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

No. 77-1337

THE YOUNGSTOWN CARTAGE CO., PETITIONER

v.

THE INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS
ASSOCIATED TRUCK LINES, INTERVENOR

Petitions for Review of Orders of the Interstate Commerce Commission

---

Argued December 12, 1977

Decided February 23, 1978

John P. McMahon, for petitioners.

L. Marie Guillory, Attorney, Interstate Commerce Commission with whom *Mark L. Evans*, General Counsel, *Frederick W. Read, III*, Associate General Counsel, Interstate Commerce Commission and *Robert L. Thompson*, Attorney, Department of Justice were on the brief, for respondents in No. 77-1337.

Charles H. White, Jr., Associate General Counsel, *Alan J. Theimann*, Attorney, Interstate Commerce Commission, *Barry Grossman* and *Joen Grant*, Attorneys, Department of Justice were on the brief, for respondents in No. 76-1225.

Raymond Michael Ripple, Attorney, Interstate Commerce Commission and *Lloyd John Osborn*, Attorney, Department of Justice also entered an appearances for respondents in No. 76-1225. *Susan J. Atkinson*, Attorney, Department of Justice also entered an appearance for respondent in No. 77-1337. *Earl E. Meisenbach*, also entered an appearance for intervenor.

Before: BAZELON, *Chief Judge*, LEVENTHAL and ROBINSON, *Circuit Judges*.

Opinion Per Curiam.

Per Curiam: This Court has before it consolidated appeals from two orders of the Interstate Commerce Commission (ICC). Appeal No. 76-1225 involves a Commission ruling that an application by the Youngstown Cartage Company (YCC) for gateway elimination, which was filed pursuant to the ICC's recent gateway elimination rules,[1] was fatally defective. In support of its fourteen part application to eliminate gateways the carrier filed a list of some 800 shipments carried during the years 1972 and 1973.

---

[1] 49 C.F.R. § 1065.1 (1976).

Historically, motor common carriers have been free to provide through service by combining two or more authorized routes at common geographical points of service ("gateways"). Use of such gateways commonly involved a degree of circuity, *i.e.*, more driving miles than would be required by a direct route. The gateway elimination rules were prompted by the energy crisis and a consequent desire to reduce the circuity involved in transporting shipments. Those rules provided procedures whereby carriers could obtain authority to provide direct service between points currently linked by gateways.

The Commission held that the applicant had failed to indicate which shipments were transported over which gateways, thereby precluding a determination that YCC had been a substantial competitor for each of its fourteen proposed authorities, as required under *Childress—Elimination Sanford Gateway*, 61 M.C.C. 421 (1952). The Commission also found that YCC had failed to identify which shipments involved a circuity of less than 20% and were already the subject of E-Letter-Notices.[2]

In a petition for reconsideration the carrier identified 29 shipments out of the 800 as involving more than 20% circuity. But the carrier still failed to advise the Commission which part or parts of its fourteen part application were supported by evidence of these 29 shipments. We think the ICC was not unreasonable in requiring that the applicant meet the minimal procedural burden put on the carriers in order to help the agency with the formidable administrative burden of the gateway elimination program, particularly in view of the benefits that program conferred on the carriers.

No. 77-1337

The effect of the ICC's action was to require that YCC discontinue "tacking" these irregular routes on and after January 22, 1976.[3] On January 21, 1976, the carrier filed a new application for the direct operating authority that it

---

[2] In cases where the gateway routes involved circuity of less than 20%, carriers could obtain direct operating authority through a simplified procedure involving the filing of "E-Letter-Notices." For routes involving more than 20% circuity, the carriers were required to file "G" applications. These applications were for additional certificates specifically authorizing the direct operations and required a showing that the applicant had actually transported goods between the points involved.

[3] "Tacking" in motor common carrier parlance refers to the linking of two separate grants of authority through gateways.

had sought unsuccessfully in its gateway elimination application. This second application did differ from the first in some material respects. It included shipping data for the years 1974 and 1975 as well as 1972 and 1973. It also was a twelve rather than fourteen part application.[4] The original application had been recast so as to eliminate duplication with authorities that the carrier had received in the interim through E-Letter-Notices.[5]

Under the ICC's gateway elimination rules, carriers that did not file applications prior to June 4, 1974, lost authority to tack their authorized routes. In view of the late filing, the Commission did not process YCC's second application under the gateway elimination rules, but instead treated the application as one for new operating authority under § 207 of the Interstate Commerce Act, which embodies a public convenience and necessity standard.[6] The application was denied on the ground that YCC proffered no shipper support for its application and therefore failed to make out a prima facie case of public need as required by *Novak Contract Carrier Application*, 103 M.C.C. 555 (1967).

Traditionally an applicant shows shipper support by filing affidavits of shippers indicating that they intend to use the service if it is authorized by the agency. This is logical because normally there is no history of service by the applicant over the route. The exception to the shipper affidavit requirement has been in cases involving the elimination of gateways, since a history of service had been

[4] Two parts of the twelve part application were not supported by traffic exhibits. Those parts are dropped from consideration on this appeal, with petitioner's acquiescence, because there was no attempted showing that YCC was a substantial competitor along those routes.

[5] *See* note 2 *supra*.

[6] 49 U.S.C. § 307 (1970).

generated by permissive tacking and the carrier was required to maintain in its application that elimination of the gateway would not result in a new service.[7] YCC maintains that its second application should have been held to this more permissive standard.

The Commission has taken the view that the standard reflected in the gateway elimination exception to the shipper affidavit rule is applicable only when the carrier has a continuing tacking authority. YCC's application was filed on the day before the effective date of the denial of its gateway application. It had no ongoing tacking authority. As noted, the gateway regulations specifically established June 4, 1974, as the final date for the filing of applications for the elimination of gateways. Operations that did not receive ap-

[7] Childress—Elimination of Sanford Gateway, 61 M.C.C. 421, 428 (1952):

> In an application such as the instant one, involving the elimination of a gateway and seeking authority which would enable operation over more direct routes, the essential facts to be determined, in the absence of testimony by public witnesses, are (1) whether applicant is actually transporting a substantial volume of traffic from and to the points involved by operating in good faith through the gateway and, in so operating, is effectively and efficiently competing with the existing carriers, and (2) whether the elimination of the gateway requirement would enable applicant to institute a new service or a service so different from that presently provided as to materially improve applicant's competitive position to the detriment of existing carriers. In the former instance, a grant of the authority sought is justified solely upon proof that the proposed operation would result in operating economies, which although primarily a benefit to the applicant, indirectly benefit the public through the medium of more efficient and economical service. In the latter instance, however, where the elimination of the gateway requirement would allow a new service, or would provide applicant with a substantial competitive advantage not previously enjoyed, it is incumbent upon applicant to prove public convenience and necessity the same as in any other application for new authority.

proval under the regulations were prohibited after that date.[8] The gateway elimination rules also barred duplicate applications.

It is apparent that this case involves issues of regulatory policy and internal administration of Commission operations. We are not free to select the rules we think best. The Commission must be given considerable leeway in control of its calendar. *Dart Trucking Co. v. United States*, 555 F.2d 555 (6th Cir. 1977). Our charter permits intervention only when we can say that the Commission has acted in a way that is arbitrary and capricious. We do not think that the Commission was acting in an arbitrary and capricious manner when it put its special gateway program, conceived in 1973 in an effort to cope with the energy emergency, under rigorous time limits, and decided that in subsequent applications it would apply the standards for shipper support that are normally employed in evaluating applications for new authority.[9]

Affirmed.

---

[8] 49 C.F.R. § 1065.1(b) (1976).

[9] As of January 22, 1976, YCC was not able to tack through the subject gateways. The customers who had depended on this tacking authority were required to find new carriers. The Commission was obviously justified in requiring evidence that YCC would be able to attract shippers—new ones, old customers regained or both.

APPENDIX B-1

Order

SERVICE DATE AUGUST 8, 1975

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 1, held at its office in Washington, D.C., on the 4th day of August, 1975.

No. MC-8958 (Sub-No. 28G)

THE YOUNGSTOWN CARTAGE CO., EXTENSION-GATEWAY ELIMINATION (Youngstown, Ohio)

It appearing, That by application timely filed, the above-named applicant seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of the commodities and from and to and between the points specifically set forth in the Federal Register publication of January 22, 1975, and republished in part as corrected in the Federal Register publication of April 14, 1975;

It further appearing, That the application has been considered under the Commission's special gateway elimination procedure (49 CFR 1065); that applicant has filed verified statements in support of the application; and that protestants David Graham Co., Jones Transfer Company, Motor Freight Express, and Roadway Express, Inc., motor common carriers, have filed verified statements in opposition to the application;

And it further appearing, That applicant has filed a massive traffic exhibit showing 800 shipments in support of this application; that applicant has failed to indicate which gateways each shipment moved through and, therefore, it is not possible to determine whether applicant has been a substantial competitor through each of the gateways it seeks to eliminate; that applicant has filed letter notices to

eliminate gateways on operations where circuity is less than 20 percent, but also seeks gateway eliminations on such operations herein; that applicant also submits the above-mentioned traffic exhibit in support of gateway eliminations on those operations where circuity is less than 20 percent, but fails to indicate which shipments in its traffic exhibit involved more than 20 percent circuity; and that in light of applicant's failure to present its traffic exhibit in such a way as to enable the Commission to determine that it has been a substantial competitor through each of the involved gateways and inasmuch as the traffic exhibit is unworkable in that regard, the application must be denied;

Wherefore, and good cause appearing therefor:

We find, That applicant has failed to establish that the present or future public convenience and necessity require the proposed operation; that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; and that the application should be denied.

It is ordered, That said application, be, and it is hereby, denied.

By the Commission, Review Board Number 1.

ROBERT L. OSWALD,
Secretary

(SEAL)

APPENDIX B-2

Order

SERVICE DATE JANUARY 7, 1976

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D.C., on the 22nd day of December, 1975.

No. MC-8958 (Sub-No. 28G)

THE YOUNGSTOWN CARTAGE CO., EXTENSION-GATEWAY ELIMINATION (Youngstown, Ohio)

Upon consideration of the record in the above-entitled proceeding, and of petition of applicant, filed September 8, 1975, for reconsideration; and good cause appearing therefor:

It is ordered, That the petition be, and it is hereby, denied, for the reasons (a) that the findings of Review Board Number 1, are in accordance with the evidence and the applicable law, and (b) that no sufficient or proper cause appears for reopening the proceeding for reconsideration, or for the granting of any of the relief sought.

It is further ordered, That this order shall be effective 15 days from the date of service hereof.

By the Commission, Division 1, Acting as an Appellate Division.

ROBERT L. OSWALD,
Secretary

(SEAL)

NOTICE: Pursuant to the Commission's Gateway Regulations, 49 CFR 1065.1(b), any carrier filing an application in good faith in accordance with 49 CFR 1065.1(d)(2), may continue to provide service by observing its concerned gateway or gateways only until final disposition of its application proceed-

ing; this order renders the above-entitled proceeding administratively final, and finally disposes of the subject application; and in accordance with the provisions of Section 558(c) of the Administrative Procedure Act, the temporary authorization provided pursuant to 49 CFR 1065.1(b) expires and applicant is required to cease operations thereunder upon the effective date of this order, except with respect to those gateways underlying any complete or partial grant of the subject application.

APPENDIX B-3

Order

SERVICE DATE FEBRUARY 24, 1976

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D.C., on the 17th day of February, 1976.

No. MC-8958 (Sub-No. 28G)

THE YOUNGSTOWN CARTAGE CO., EXTENSION-GATEWAY ELIMINATION (Youngstown, Ohio)

Upon consideration of the record in the above-entitled proceeding, and of petition of applicant, filed January 22, 1976, for modification of the effective date of the order of this Commission dated December 22, 1975, which denied applicant's petition for reconsideration; and for reopening and oral hearing; and

It appearing, That petitioner seeks postponement of the effective date of the involved order pending disposition of a concurrently filed OP-OR-9 application for direct authority similar in scope to its gateway elimination application; that it seeks this action in order to permit a continued tacking of the involved operating authorities to provide a continuity in the involved traffic; that petitioner is reminded of the availability of temporary authority issued by this Commission; that no proper or sufficient reason has been presented for delaying the effectiveness of the Appellate Division's order which became effective on January 22, 1976; that the order of the Appellate Division is administratively final and applicant's requests for reopening and oral hearing do not properly lie at this late date; and that the petition will be denied in its entirety; and good cause appearing therefor:

It is ordered, That the petition be, and it is hereby, denied.

By the Commission, Division 1, Acting as an Appellate Division.

ROBERT L. OSWALD,
Secretary

(SEAL)

APPENDIX C-1

Order

SERVICE DATE NOVEMBER 19, 1976

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 2, held at its office in Washington, D.C., on the 15th day of November, 1976.

No. MC-8958 (Sub-No. 31)

THE YOUNGSTOWN CARTAGE CO. EXTENSION-ELIMINATION OF GATEWAYS (Youngstown, Ohio)

It appearing, That by an appropriately filed application, as amended, the above-named applicant seeks a certificate of public convenience and necessity authorizing operations as set forth in its verified statement dated September 9, 1976, and filed September 13, 1976, at appendix A thereof;

It further appearing, That the application has been considered under the Commission's modified procedure; that applicant has filed a verified statement in support of the application, containing evidence of its fitness, willingness, and ability to provide the proposed service, including appropriate feasibility, operational, and financial data; that motor common carrier protestants Associated Truck Lines, Inc., Motor Freight Express, and R-W Service System, Inc., have filed verified statements in opposition to the application; and that applicant has filed an argument of counsel in rebuttal;

It further appearing, That the instant application is regarded by applicant as an application for the elimination of gateways; that applicant (YCC) asserts that it "has been handling the involved traffic via the designated gateways for many years"; and that YCC concedes that the purpose of the instant application "is to fill out the territory historically served by YCC by the tacking of its existing authorities";

It further appearing, That in view of our subsequent conclusions and disposition of this application, there is no need to discuss the evidence submitted by protestants;

It further appearing, That motor carriers which elected to avail themselves of the benefits of the special procedures established in *Gateway Elimination,* 119 M.C.C. 530 (1974), were required to file appropriate applications or letter notices with the Commission on or before June 4, 1974; that irregular-route motor carriers thereafter were prohibited from the joinder of their authorities, see 49 CFR section 1065(b); that applicant attempted to avail itself of these procedures, but its pertinent "G" application was denied for various reasons; that, therefore, as of the administrative finality of the "G" application denial, applicant was prohibited from tacking the underlying authorities which assertedly enabled it to provide the services which are the subject of the instant application; that, in these circumstances, we can no longer characterize the instant application as an attempt to eliminate gateways, and, therefore, neither the rules established in *Gateway Elimination, supra,* nor the older principles established in *Childress-Elimination Sanford Gateway,* 61 M.C.C. 421 (1952), are applicable to the instant application; and that, accordingly, despite the fact that applicant may previously have provided service through the involved gateways, this application must be considered as one seeking new operating authority;

And it further appearing, That we are of the opinion that this proceeding is not analogous to any motor carrier application cases[1] where a relaxed burden of proof is warranted; that applicant is not seeking authority to replace or alter a service it is now capable of performing; that, in certain situations, while still having to establish a present

[1] Route conversions, interchange point relocations, alternate routes, "grandfather" applications, or conversions of certificates of registration.

or future need for the proposed service, motor carrier applicants are entitled to equitable considerations on the basis of their having previously handled traffic which is the subject of a pending application; that the evidence of record herein, however, forces us to conclude that applicant is not entitled to any such consideration as an application for new operating authority must be accompanied by the verified statements of a supporting shipper or shippers in order to establish a prima facie case of need, cf. *Novak Contract Carrier Application,* 103 M.C.C. 555 (1967); and that, therefore, inasmuch as applicant has failed to present any evidence of supporting shippers, the applications must be denied;

Wherefore, and good cause appearing therefor:

We find, That applicant has failed to establish that the present or future public convenience and necessity require the proposed operation; that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; and that the application should be denied.

It is ordered, That said application be, and it is hereby, denied.

By the Commission, Review Board Number 2, Members Boyle, Eaton, and Liberman.

H. Gordon Homme, Jr.
Acting Secretary

(Seal)

APPENDIX C-2

Order

SERVICE DATE MARCH 21, 1977

At a session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D.C., on the 11th day of March, 1977.

No. MC-8958 (Sub-No. 31)

THE YOUNGSTOWN CARTAGE CO. EXTENSION-ELIMINATION GATEWAYS (Youngstown, Ohio)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of applicant, filed December 20, 1976, for reconsideration;

(2) Reply by Motor Freight Express, protestant, filed January 7, 1977;

and good cause appearing therefor:

It is ordered, That the petition be, and it is hereby, denied, for the reason that the findings of Review Board Number 2 are in accordance with the evidence and the applicable law.

It is further ordered, That this order shall be effective 15 days from the date of service hereof.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Murphy, Gresham, and MacFarland.

ROBERT L. OSWALD,
Secretary

(SEAL)

NOTICE: By this order, this proceeding is rendered administratively final within the meaning of 49 CFR 1101.2(f) of the Commission's regulations; and, in accordance with the provisions of Section 558 (c) of the Administrative Procedure Act, any corresponding temporary authority expires and operations thereunder must cease upon the effective date of this order, except that to the extent permanent authority is granted in this proceeding (and if partial, only to that extent) the corresponding temporary authority or portion thereof will continue in effect until a certificate or permit is issued and becomes effective. The filing of any further pleadings in this matter will not stay the expiration of the temporary authority related to the denied portion of the sought permanent authority.

APPENDIX D

Statutes and Regulations Involved

SECTION 8, ADMINISTRATIVE PROCEDURE ACT,
5 U.S.C. § 557(c)

"(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of——

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof."

SECTION 10(e), ADMINISTRATIVE PROCEDURE ACT,
5 U.S.C. § 706

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise nor in accordance with the law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

National Transportation Policy (Chapter 8, Part II of the Interstate Commerce Act), 49 U.S.C. preceding § 301

"*National transportation policy.* Act Sept. 18, 1940: 'It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical,

and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act [chapters 1, 8, 12, 13 and 19 of this title] shall be administered and enforced with a view to carrying out the above declaration of policy.' ''

SECTION 206(a) OF INTERSTATE COMMERCE ACT,
49 U.S.C. § 306(a)

"(a)(1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations. . . ."

SECTION 207(a), INTERSTATE COMMERCE ACT,
49 U.S.C. § 307(a)

"Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements,

rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

49 CFR § 1065.1 Gateways and tacking—irregular-route motor common carriers of property

"(a) Where a common carrier by motor vehicle authorized to transport property in interstate or foreign commerce holds separate and unrestricted irregular-route certificated authorities issued by the Interstate Commerce Commission, which authorities have a common point of service (a 'gateway') to which a given shipment may be transported under one authority and from which the same shipment may be transported under the other, the carrier is required, upon reasonable request therefor, to furnish through service on the shipment under a combination of the authorities and may do so without transporting the shipment through the common service point or points; *provided:* (1) That the certificated authorities so utilized were issued to the carrier pursuant to an application proceeding pending before the Interstate Commerce Commission on or before November 23, 1973, (2) that none of the authorities is restricted against such joining, (3) that the most direct highway distance between the points[1] to be served is not

[1] In those cases where a carrier may serve a municipality or unincorporated community pursuant to this rule without the necessity of observing a gateway specified in its certificated authorities; the carrier shall serve all points within its terminal area at such municipality or unincorporated community in accordance with 49 CFR 1049.

less than 80 per cent of the highway distance between such points over the carrier's authorized routing through the gateway, (4) that a lawful and appropriate tariff covering the movement via the gateway was on file with the Interstate Commerce Commission on November 23, 1973, or that the carrier had pending an application on the aforementioned date which was subsequently granted, and (5) the carrier follows the procedures prescribed in paragraph (d)(1) of this section.

(b) Except where expressly allowed under paragraph (a) of this section, or on movements of 300 miles or less, or where its certificated authorities specifically authorize such tacking or joinder, a common carrier by motor vehicle authorized to transport property, in interstate or foreign commerce, is prohibited from joining any of its irregular route certificated authorities on and after the effective date of this regulation. Any common carrier by motor vehicle providing such prohibited service on or before the date this regulation takes effect shall cease such operations on or before the 60th day following the said effective date, unless it files an application for direct service operating authority pursuant to section 206 of the Interstate Commerce Act on or before the 60th day following the effective date. Such an application may have the support of the shipper or shippers currently served by the carrier applicant, shall be filed and processed in accordance with the procedures prescribed in paragraph (d)(2) of this section, and shall be determined in accordance with the requirements of section 207 of the Interstate Commerce Act giving full effect to the applicant's past service and operations through the gateway. Any such carrier filing such an application in good faith may continue to provide such service by observing its gateways or gateway until final disposition of its application proceeding.

(c) The mileages utilized in determining whether the most direct highway distance between the points to be

served is not less than 80 per cent of the highway distance between such points over the carrier's authorized routing through the gateway, shall be calculated from the point of origin (i.e., the point on the carrier's authorized route where the shipment begins its journey) to the point of destination (i.e., the point on the same carrier's authorized route where the shipment ends its journey) of the shipment or shipments involved.

(d) (1) A carrier seeking to eliminate gateways pursuant to paragraph (a) of this section shall be required to adhere to the following procedures:

(i) File a letter and two copies thereof with this Commission at its offices in Washington, D.C. and one copy with this Commission's field office having jurisdiction over the point at which the carrier is domiciled, describing the gateways to be eliminated (this should include origin, destination, and gateway, applicable mileages, and a suitable map), and attaching either (A) copies of appropriate tariff provisions establishing that such through services were offered by the carrier on November 23, 1973, or (B) a verified statement establishing that the certificated authority enabling operations through the gateway were issued to the carrier pursuant to an application proceeding pending before the Interstate Commerce Commission on November 23, 1973.

(ii) Allow 15 days from the date of publication in the FEDERAL REGISTER of a notice of the carrier's intention to eliminate its gateways and for Commission review of the letter submission. Protests to such notices must be received at the Commission at Washington, D.C. within 10 days of the date of that publication. If the carrier is not otherwise informed by this Commission, operations may commence at the termination of the said 15-day period. This Commission reserves the right to require that a carrier terminate these operations if it should later be discovered that

the carrier's operations do not qualify for the benefits of this rule.

(iii) Letter submissions under this rule will not be accepted after June 4, 1974, except in those cases in which the certificated authority to be joined was issued pursuant to an application proceeding pending before the Interstate Commerce Commission on November 23, 1973. In such instances, the carrier shall make such filing within 60 days from the date of issuance of the authority in issue.

(2) A carrier that maintains gateway operations which do not meet the criteria set forth in paragraph (a) of this section may, if it desires to continue to provide such through service to the public, file OP-OR-9 applications with this Commission seeking direct-service authority. Such an application shall include:

(i) In bold print in the upper right-hand corner of page 1, the words GATEWAY ELIMINATION.

(ii)(A) A carrier relying on certificated authorities issued to in on or prior to November 23, 1973, shall submit copies of appropriate tariff provisions establishing that such through services were offered by the carrier on November 23, 1973.

(b) A carrier relying on certificated authorities issued to it after November 23, 1973, as a result of an application pending on that date shall present verified statements establishing either (1) that the service through the gateway point has been performed (as in the case of the carrier's demonstrated participation in deteriorating interline or interchange service) on November 23, 1973, or (2) that a public need for such through service exists.

(iii) An initial verified statement in support of the application. This should include all of the evidence applicant plans to present in the proceeding, including (to the extent pertinent) evidence of the applicant's (or its established

predecessor-in-interest's) past operations via the gateway for the 2 years preceding November 23, 1973, and the relevant matters and evidence set forth in subdivision (ii) of this subparagraph. Evidence of supporting shippers need not be presented except as set forth in subdivision (ii)(B) of this subparagraph but will be considered and accorded appropriate weight if submitted.

(iv) Such applications must be filed on or before the 60th day following the effective date of these regulations, or within 60 days following the date of issuance of the certificated authorities so to be joined if such authorities are issued to the carrier pursuant to an application proceeding pending before the Interstate Commerce Commission on November 23, 1973, whichever date last occurs. The application will be processed in accordance with the normal procedures of the Interstate Commerce Commission as modified in the Federal Register publication of a notice of the filing of such applications (which shall reflect the procedure outlined in the Commission's report and order in *Gateway Elimination*, 119 M.C.C. 530).

(e) Any motor carrier which has pending on the effective date of these regulations an application for the elimination of a gateway and which desires to utilize the rules set forth above, should notify the Director of the Office of Proceedings of the Interstate Commerce Commission of the pendency of such application and should include the pertinent docket number. Duplicate applications should not be filed."

APPENDIX E

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C. 20423

OFFICE OF PROCEEDINGS September 30, 1974

John P. McMahon
100 East Broad Street
Columbus, Ohio 43215

RE: OP-OR-9 Gateway Elimination Application No. MC-8958 (Sub-No. 28-G) Gateway: Youngstown Cartage Company

Dear Mr. McMahon,

Please supply the materials, documents and/or information indicated by check below to complete the filing of the above-referenced application:

—— Please submit an appropriate tariff establishing that the proposed services were offered on November 23, 1973;

xxx Please indicate the specific portions of applicant's existing authority the subject of *each* requested gateway elimination and the actual gateway point or points sought to be eliminated with reference thereto;

—— Please serve a copy of this application on the appropriate State Board having regulatory jurisdiction in the following state(s):

Replies should reference the case number designated above and be addressed to:

Interstate Commerce Commission
Gateway Section B
Washington, D.C. 20423

Very truly yours,
/s/ NORETA R. MCGEE
Noreta R. McGee
Ass't Chief, Section of
Case Control and
Information

29
Page 5

APPENDIX F

Part 1(a) [Appendix G]: Forty shipments weighing 1,545,334 pounds representing only eight percent of the total traffic handled. This means that applicant handled a total of approximately 19,316,675 pounds during the four year period for an average of 4,829,168 pounds annually.

Part 1(b) [Appendix H]: Forty shipments weighing 1,547,408 pounds representing three percent of the total shipments handled. This means that applicant handled a total of approximately 51,580,266 pounds during the four year period for an average of 12,895,066 pounds annually.

Part 1(c) [Appendix I]: Forty shipments weighing 1,440,237 pounds representing six percent of the total shipments handled. This means that applicant handled a total of approximately 24,003,950 pounds during the four year period for an average of 6,000,987 pounds per year.

Part 1(d) [Appendix J]: Forty shipments weighing 1,670,731 pounds representing seven percent of the total shipments handled. This means that applicant transported a total of approximately 23,867,585 pounds during the four year period for an average of 5,966,896 pounds per year.

Part 1(e) [Appendix K]: Forty shipments weighing 1,434,401 pounds representing five percent of the total shipments handled. This means that applicant transported a total of approximately 28,688,020 pounds during the four year period for an average of 7,172,005 pounds per year.

29
Page 6

Part 2(a) [Appendix L]: Forty shipments weighing 1,835,265 pounds representing nine percent of the total shipments. This means that applicant transported a total

of approximately 20,391,833 pounds for an average of 5,097,958 pounds per year.

Part 2(b) [Appendix M]: Forty shipments weighing 1,643,951 pounds representing seven percent of the total shipments. This means that applicant transported a total of approximately 23,485,014 pounds for an average of 5,871,253 pounds per year.

Part 2(c) [Appendix N]: Forty shipments weighing 1,684,335 pounds representing nine percent of the total shipments. This means that applicant handled a total of approximately 18,714,833 pounds for an average of 4,678,708 pounds per year.

Part 3(a) [Appendix O]: Forty shipments weighing 1,709,741 pounds representing eight percent of the total shipments. This means that applicant transported a total of approximately 21,371,762 pounds during the four year period for an average of 5,342,940 pounds per year.

Part 3(b) [Appendix P]: Forty shipments weighing 1,576,466 pounds representing eleven percent of the total shipments. This means that applicant transported a total of approximately 14,331,327 pounds for an average of 3,582,831 pounds per year.

Supreme Court, U. S.
FILED
JUL 12 1979
MICHAEL RODAK, JR., CLERK

No. 77-1651

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE YOUNGSTOWN CARTAGE CO., PETITIONER

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

MARK L. EVANS,
General Counsel,

FREDERICK W. READ, III,
Associate General Counsel,

L. MARIE GUILLORY,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1651

THE YOUNGSTOWN CARTAGE CO., PETITIONER

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 571 F.2d 1243. The orders of the Interstate Commerce Commission (Pet. App. 7a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1978. The petition for a writ of

certiorari was filed on May 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Interstate Commerce Commission lawfully denied petitioner's applications for additional motor carrier operating authority.

STATEMENT

In early 1974 the Interstate Commerce Commission adopted regulations designed to create more efficient interstate trucking services without unduly upsetting the motor carrier regulatory scheme. Under what was termed the "gateway elimination" policy, the Commission agreed to consider applications from trucking companies for direct service authorizations between points that the companies had previously served only indirectly.[1] *Gateway Elimination Decision*, 119 M.C.C. 530. 49 C.F.R. 1065.1.

Under the previous practice, when carriers were not authorized to provide direct service between two points they could provide indirect service by "tacking" their authorized routes together through what were termed "gateway" points. For example, if a carrier were authorized to provide service from Pittsburgh to Cincinnati and from Cincinnati to Indianapolis, it could provide service from Pittsburgh to Indianapolis

[1] This Court upheld the gateway elimination rules in *Thompson Van Lines, Inc.* v. *United States*, 399 F. Supp. 1131 (D. D.C.), affirmed, 423 U.S. 1041.

by "tacking" the two routes together. But the carrier would still be required to follow its authorized routes to and from the "gateway" point—in this example, Cincinnati—rather than shipping by the most direct overland route (Pet. App. 2a-3a).

Under the new policy, the Commission permitted qualifying carriers to eliminate the need to pass through the "gateway" points. Where the length of the direct route between two points was more than 80 percent of the length of the indirect route through the carrier's gateway, the carrier could eliminate the gateway simply by filing a notice of intention to do so. 49 C.F.R. 1065.1(d)(1)(i). Where the gateway route was more circuitous—and where it was therefore less likely that the carrier had previously provided significant service between the two points—the carrier was required to file a special application for elimination of the gateway. This application was required to show that the carrier had been handling traffic between the two points via the gateway during the two years preceding November 23, 1973. 49 C.F.R. 1065.1(d)(2)(iii). If the carrier did not eliminate particular gateways by one of these two methods, the regulations provided that "tacking" would no longer be permitted, and the carrier would be prohibited from continuing to offer indirect service through its gateways. 49 C.F.R. 1065.1(b).

Petitioner, an interstate trucking company, filed an application to eliminate 14 of its gateways that involved circuity of more than 20 percent and therefore could not be eliminated without the special showing

required by the regulations. The Commission denied petitioner's application on procedural grounds (Pet. App. 7a-8a). The Commission stated that petitioner's evidence (an exhibit listing some 800 random shipments from the previous two years) failed to specify the gateway through which each shipment had moved. Moreover, the Commission noted that petitioner's application had failed to distinguish between shipments on routes having less than 20 percent circuity (and thus subject to gateway elimination simply upon filing a letter notice) and those on more circuitous routes. In light of petitioner's "failure to present its traffic exhibit in such a way as to enable the Commission to determine that it has been a substantial competitor through each of the involved gateways" (Pet. App. 8a), and because the traffic exhibit was "unworkable" (*ibid.*), the Commission denied the application.

On January 21, 1976, one day before the Commission's final decision in the first proceeding became effective, petitioner filed a second application, substantially identical to the first, in which it attempted to remedy the evidentiary deficiencies of the prior application. Although the second application purported also to be filed under the Commission's gateway rules, the Commission held that it was untimely under those rules (Pet. App. 11a-12a).[2] Treating the application

[2] The gateway regulations required applications for eliminating gateways involving more than 20 percent circuity to be filed within 60 days of April 5, 1974, the date the order promulgating the regulations became effective. 39 Fed. Reg. 7794; 49 C.F.R. 1065.1(d)(2)(iv). All unapproved operations through gateways were prohibited after that date. 49 C.F.R. 1065.1(b). The gateway regulations also barred duplicate applications. 49 C.F.R. 1065.1(e).

as a traditional request for new operating authority under Section 207(a) of the Interstate Commerce Act, as added, 49 Stat. 551, 49 U.S.C. 307(a), the Commission denied the application because petitioner failed to offer proof of shipper support for the requested routes (Pet. App. 13a-15a).

The court of appeals affirmed both of the Commission's orders, finding that the Commission had lawfully exercised its discretion in denying the applications (Pet. App. 1a-6a). As to the denial of the 1974 application, the court held that the Commission "was not unreasonable in requiring that the applicant meet the minimal procedural burden put on the carriers in order to help the agency with the formidable administrative burden of the gateway elimination program, particularly in view of the benefits that program conferred on the carriers" (Pet. App. 3a). With respect to the denial of the 1976 application, the court concluded that because that application had been filed at a time when petitioner's tacking authority was about to expire and because the Commission rules barred duplicate gateway elimination applications, the Commission had not acted in an arbitrary or capricious manner in treating the application as a request for new authority and imposing the normal requirement of proof of shipper support for the requested routes rather than the more lenient proof requirements applicable in gateway elimination proceedings.

ARGUMENT

The gateway elimination rules involved in this case governed only applications filed before 1975. The case therefore does not present any issue of continuing importance requiring this Court's review. Moreover, the decisions of the Commission and the court of appeals are correct.

1. The court of appeals properly sustained the Commission's denial, on procedural grounds, of petitioner's failure to indicate which shipments in its 800 shipment sample moved through which gateways made its application almost worthless, because the Commission could not determine whether petitioner had been a substantial competitor in each of the markets in question, and thus whether elimination of the gateway would serve the purpose of curbing wasteful circuity without allowing a new carrier into a market that it had not previously served. The requirement that a carrier show that it had been a substantial competitor between the two points through its gateway connection was a traditional one, *Childress—Elimination Sanford Gateway*, 61 M.C.C. 421, and the agency's denial of the application for failure to meet that standard was entirely reasonable.[3]

[3] *Chem-Haulers, Inc.* v. *Interstate Commerce Commission*, 565 F.2d 728 (C.A. D.C.), on which petitioner relies, is inapposite. In that case the Commission granted portions of a gateway elimination application but denied other portions on the ground that the applicant had not transported "substantial" traffic through certain gateways. The court reversed because of the Commission's failure to explain what constituted "substantial" traffic. *Id.* at 732. In the present case, by contrast, the Commission was precluded from making any findings regarding the substantiality of traffic through petitioner's gateways because of the inadequacy of petitioner's evidentiary presentation. (In any event, any conflict among decisions of the same court of appeals would be for that court to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902.)

2. The Commission's refusal to consider petitioner's second application under its gateway rules and its denial of the application as a request for new authority also were proper. Because petitioner's second application was filed approximately 18 months after the published deadline for filing gateway elimination applications, the Commission was entirely justified in declining to process it under the special 1974 gateway elimination procedures.[4]

Petitioner submitted no shipper support evidence or any other evidence sufficient to make out a *prima facie* case for a grant of new authority, see *Novak Contract Carrier Application*, 103 M.C.C. 555, and the Commission therefore acted within its discretion in denying the 1976 application. See *Ross Express*,

[4] There is no basis for petitioner's assertion that the court of appeals' decision is inconsistent with *Frozen Food Express, Inc.* v. *United States*, 535 F.2d 877 (C.A. 5). In that case the Commission refused to reopen a gateway elimination application to consider additional evidence submitted by the complaining carrier, although it had accepted late-filed evidence from other carriers. The court vacated the Commission's order on the ground that the carrier whose evidence was not considered had not received "evenhanded" treatment. *Id.* at 880. Here, by contrast, petitioner has failed to show that any similarly-situated carrier has been treated differently by the agency.

Inc. v. *United States*, 529 F.2d 679, 682 (C.A. 1); *Artus Trucking Co., Inc.* v. *Interstate Commerce Commission*, 377 F. Supp. 1224, 1228 (E.D. N.Y.). As the court of appeals pointed out, in view of the fact that petitioner was no longer conducting operations through the gateways at issue, "[t]he Commission was obviously justified in requiring evidence that [the carrier] would be able to attract shippers—new ones, old customers regained or both" (Pet. App. 6a n.9).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MARK L. EVANS,
General Counsel,

FREDERICK W. READ, III,
Associate General Counsel,

L. MARIE GUILLORY,
Attorney,
Interstate Commerce Commission.

JULY 1978.

---

[5] Petitioner's assertion that the gateway elimination rules reduce competition contrary to the national transportation policy (Pet. 13) is without merit. *Thompson Van Lines, Inc.* v. *United States*, 399 F. Supp. 1131 (D. D.C.), affirmed, 423 U.S. 1041.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 269000 61